

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2   OF THE STATE OF OREGON  
3

4 MONTY ELDER and LILLIAN ELDER, )  
5   ) )  
6                           Petitioners, )  
7   ) )  
8           vs.                            ) )  
9   ) )  
10 DOUGLAS COUNTY,                        ) )  
11   ) )  
12                           Respondent. )

LUBA No. 96-243  
  
FINAL OPINION  
AND ORDER

13  
14  
15           Appeal from Douglas County.

16  
17           Bill Kloos, Eugene, filed the petition for review.  
18 With him on the brief was Johnson, Kloos & Sherton.

19  
20           No appearance by respondent.

21  
22           GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,  
23 Referee, participated in the decision.

24  
25                           REMANDED                           06/17/97

26  
27           You are entitled to judicial review of this Order.  
28 Judicial review is governed by the provisions of ORS  
29 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a two-lot  
4 partition with a variance to road improvement standards.

5 **FACTS**

6 The subject property is a 3.49-acre parcel within the  
7 Urban Growth Boundary (UGB) but outside the city limits of  
8 the City of Myrtle Creek. In 1973, a 2.51-acre portion of  
9 the property was conveyed without partition approval. That  
10 portion of the property is vacant. The remaining .98-acre  
11 portion is developed with a single family residence.

12 The subject property fronts a private graveled road  
13 easement known as Norton Lane. The county's Land Use and  
14 Development Ordinance (LUDO) 4.100.5(b)(3)(a) requires that  
15 private roads within UGBs may serve not more than three  
16 units of land.<sup>1</sup> The LUDO standards for private roads  
17 require that private urban roads may serve a maximum of  
18 three lots and must have a minimum width of 25 feet. LUDO

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<sup>1</sup>LUDO 4.100.5(b)(3)(a), states:

"In 'Urban Unincorporated' areas designated on the Comprehensive Plan, a unit of land may have access by way of a private road upon findings by the Approving Authority that such road provides access for not more than three (3) units of land and service to adjacent areas or additional units of land is prevented by conditions specified in paragraph (1)(d) of LUDO Section 4.11.5.b."

1 4.420, Table 3.<sup>2</sup> Norton Lane is currently 16 feet in width  
2 and serves 21 residences.

3 The applicant before the county owns the 2.51-acre  
4 portion of the property and proposes to develop it with a  
5 residence. The applicant did not own the property at the  
6 time of the illegal conveyance, but knew when he purchased  
7 the property that it had not been legally partitioned. In  
8 order to develop the property, the applicant applied to the  
9 county for a partition to legalize the 1973 conveyance. One  
10 of the county's partition criteria requires compliance with  
11 the road improvement standards. Because Norton Lane does  
12 not meet those standards, the applicant requested a variance

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<sup>2</sup>The property is also subject to a "Right-of-Way Protection Overlay" for Norton Lane to facilitate future development of that road. Although private, Norton Lane is classified by the county as a "minor collector." The county staff report states that a minor collector requires a right-of-way width of sixty feet. The right-of-way protection overlay requires that partitions of land subject to the overlay be conditioned upon a requirement that the property owner

"(1) dedicate, irrevocably offer to dedicate or irrevocably offer to sell the right-of-way necessary to develop the designated streets for their full length adjacent to or through the property to be divided; and (2) improve the rights-of-way to local or minor collector standards, as appropriate, for the length of any street necessary to serve the lots or parcels being created." Douglas County Comprehensive Plan, Land Use Element, Policy No. 3, Objective F.

The county's decision includes a condition requiring compliance with the dedication component of this policy. The decision does not address the second component. Petitioner does not assign error regarding compliance with this policy.

1 to that partition criterion.<sup>3</sup>

2 The applicable variance criteria of LUDO 4.450 state:

3 "1. Where extraordinary hardship would result  
4 form strict compliance with this [Land  
5 Division] chapter, variances from the  
6 requirements of the Chapter may be granted so  
7 that substantial justice may be done,  
8 provided that the public interest is  
9 protected. \* \* \*

10 "2. A variance to the requirements of this  
11 chapter may be approved where all of the  
12 following criteria are found to exist:

13 "a. Exceptional or extraordinary  
14 circumstances apply to the property  
15 which do not apply generally to other  
16 properties in the same zone or vicinity  
17 which result from lot size or shape,  
18 topography or other circumstances over  
19 which the property owner since the  
20 enactment of this ordinance has had no  
21 control.

22 " \* \* \* \* \*

23 "c. The variance would conform with the  
24 purposes of this ordinance and would not  
25 be materially detrimental to property in  
26 the same zone or vicinity in which the  
27 property is located, or otherwise

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<sup>3</sup>The applicant submitted two separate applications, one for the partition and a second for the variance to the partition requirements. The county treated them as a single application for a partition with a variance. The staff report explains the scope of the requested variance as follows:

"Because the subject access, Norton Lane, currently serves twenty-one users the road system does not meet the improvement requirements [of LUDO 4.100.5(b)(3)(a)]. The applicant has requested a variance to the road improvement standards to allow the proposed partition to occur without further improvements to Norton Lane." Record 65.

1 conflict or reasonably be expected to  
2 conflict with the Comprehensive Plan.

3 "d. The variance is the minimum variance  
4 which would alleviate the difficulty.

5 "e. The variance is not the result of a  
6 self-created hardship."

7 The county planning commission granted the variance and  
8 approved the partition application. Petitioners appealed  
9 the approval to the board of commissioners. The LUDO  
10 requires that at least two commissioners must agree to  
11 amend, reverse or remand a planning commission decision.  
12 The commissioners could not reach such agreement, and  
13 therefore ordered that the planning commission decision  
14 would stand.<sup>4</sup>

15 This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioner contends the county's findings of compliance  
18 with the "extraordinary circumstances" standard in LUDO  
19 4.450(2)(a) misinterprets and is contrary to the law, is

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<sup>4</sup>The planning commission adopted and incorporated into its decision the "findings of the staff report." Record 11. As we read the planning commission decision, it adopts only that section of the staff report labeled "Findings." To the extent the planning commission may have intended to adopt more than the "Findings" section, it did not make that intent sufficiently clear for us to understand the intended scope of its findings. Spencer Creek Neighbors v. Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-079, January 31, 1997), slip op 4; Johnson v. Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 95-207, August 19, 1996). Therefore, we consider as the county's final decision, the board order that adopts the planning commission decision (Record 8-9), the planning commission findings and decision (Record 10-12), and the findings section of the staff report (Record 68-71).

1 based on inadequate findings, and is not supported by  
2 substantial evidence in the record.

3 The county's findings of compliance with this  
4 requirement state:

5 "Exceptional circumstances apply to the property  
6 which do not apply generally to other properties  
7 in the same zone in that Norton Lane is a  
8 substandard road which does not meet the County  
9 public road standards and improvement to such  
10 standards within the existing right-of-way would  
11 not be possible." Record 68.

12 The essence of this finding is that the "exceptional  
13 circumstances" are that the road does not meet the public  
14 road standards, and that it cannot meet the standards  
15 without increasing the right-of-way. As petitioner states,

16 "This finding is fatally infirm. Its most basic  
17 shortcoming is that it finds that the exceptional  
18 circumstances are the need for the variance from  
19 the road standards. This is akin to saying that  
20 the existence of the road standards creates the  
21 need for a variance from those standards."  
22 Petition for Review 6.

23 Petitioner also argues, and we agree, that this finding  
24 is impermissibly conclusory. It does not provide any  
25 interpretation of "extraordinary circumstances," as the  
26 county applies that term. It does not provide a  
27 "justification of the decision based on the criteria,  
28 standards and facts set forth" as required by ORS  
29 215.416(9). It also is not supported by substantial  
30 evidence. It contains no discussion or evidence to support  
31 a conclusion that the exceptional circumstances result from

1 circumstances over which the owner has no control or that  
2 the circumstances do not apply to other properties in the  
3 same zone. As petitioner explains, the subject property is  
4 surrounded by similarly zoned R-1 (single family  
5 residential) properties on three sides, and all of the  
6 properties are similarly situated in that their access is by  
7 Norton Lane. The county's finding contains no discussion or  
8 evidence to support a conclusion that the circumstances of  
9 the subject property are any different from those of the  
10 surrounding properties.

11 The first assignment of error is sustained.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner contends the county's findings of compliance  
14 with the "materially detrimental" standard in LUDO  
15 4.450(2)(c) misinterprets and is contrary to the law, is  
16 inadequate, and is not supported by substantial evidence in  
17 the record.

18 The county's finding of compliance with LUDO  
19 4.450(2)(c) states:

20 "It is the purpose and intent of the Douglas  
21 County Comprehensive Plan and Land Use and  
22 Development Ordinance to bring that which violates  
23 the ordinance into compliance. The variance to  
24 road standards would make possible approval of the  
25 proposed partition, thereby rectifying the  
26 existing violation. The proposed partition and  
27 accompanying variance to road standards are,  
28 therefore, consistent with the intent and purpose  
29 of the Plan and Ordinance. The variance would not  
30 be materially detrimental to property in the same  
31 zone or vicinity, as it will support improvement

1 of Norton Lane. If the proposed partition and  
2 variance are approved, the applicant will be  
3 required to execute an irrevocable offer to sell  
4 thirty feet (30') of right-of-way from the  
5 centerline of Norton Lane, and to execute an  
6 agreement to participate in a private maintenance  
7 program and a waiver of objection to assessment to  
8 ensure such participation." Record 69.

9 Petitioner argues, and we agree, that this finding is  
10 inadequate, in part, for failure to identify the applicable  
11 purpose and intent section. As petitioner points out, there  
12 are at least three "purpose and intent" sections in the LUDO  
13 that potentially are applicable to the requested variance.  
14 The county must identify which, if any, of these apply here.  
15 If the county then interprets each of the purpose and intent  
16 sections it finds applicable to have the same meaning, i.e.,  
17 "to bring that which violates the ordinance into  
18 compliance," the county must provide some explanation of the  
19 inter-relationship between the applicable sections, and  
20 explain how the language of the applicable sections relates  
21 to the county's interpretation.

22 The finding is further inadequate because it does not  
23 address the primary impact of the variance. Petitioner  
24 argued before the county, and again here, that the variance  
25 to the partition criterion requiring compliance with road  
26 improvement standards would have a detrimental impact  
27 because the partition will create an additional buildable  
28 lot on Norton Lane. Although the county staff report  
29 acknowledges the additional residence allowed by the

1 partition will create an impact, it makes no finding as to  
2 how this additional residence affects compliance with the  
3 detrimental impact standard.<sup>5</sup> We agree with petitioner that  
4 the impact of an additional buildable lot along Norton Lane  
5 must be evaluated to determine whether a variance to this  
6 partition requirement will create a detrimental impact.

7 The second assignment of error is sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner contends the county's findings of compliance  
10 with the "self-created hardship" standard in LUDO  
11 4.450(2)(e) misinterprets and is contrary to the law, is  
12 based on inadequate findings, and is not supported by  
13 substantial evidence in the record.

14 The county's finding regarding LUDO 4.450(2)(e) states:

15 "The violation of the subject property occurred in

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<sup>5</sup>The staff report explains the effect of the partition as follows:

"There are currently twenty-one users served by Norton Lane. The proposed partition would create the potential for the development of one additional dwelling. One additional single family dwelling would increase the average number of vehicle trips per day by approximately 10 trips per day." Record 63.

In evaluating the requirement from which the variance was granted, the staff report states:

"Approval of the requested variance to road standards will allow the development of one additional parcel along Norton Lane without further improvements to the road. Therefore, it is reasonable to require assurance that the road will be maintained at its current level of improvement or better. The applicant shall agree to participate in a private maintenance program for Norton Lane and shall execute a waiver of objection to assessment to ensure such participation." Record 65.

1           1973 when the titleholders at that time \* \* \*  
2           conveyed a portion of the property \* \* \*. The  
3           violation occurred prior to the current  
4           titleholder's ownership." Record 70.

5           This factual finding is inadequate to establish  
6           compliance with LUDO 4.450(2)(e) in that it does not reach  
7           any conclusions regarding compliance with that standard.  
8           The facts recited do not in themselves establish that the  
9           need for the variance to the road improvement standards to  
10          allow the partition is not the result of a self-created  
11          hardship.

12          Even if this finding could be read to find that the  
13          hardship was not self-created because it occurred prior to  
14          the current titleholder's ownership, the county has provided  
15          no interpretation of "self-created hardship." As petitioner  
16          argues, the implication in the county's finding, that the  
17          hardship is not self-created because the applicant did not  
18          own the property when it was illegally conveyed, could  
19          render the standard meaningless:

20          "If the illegal partition had been an illegal  
21          conveyance by the Applicant, there would be no  
22          question that the hardship would have been self-  
23          created. Here the Applicant purchased from his  
24          predecessor knowing that the property had been  
25          illegally divided. The hardship is necessarily  
26          still self-created. The applicant did not need to  
27          purchase the property. Knowing that it was  
28          illegally divided, he could have declined to  
29          purchase. In a more basic sense, however, the  
30          'self-created hardship' standard must necessarily  
31          be read to mean that the actions of the  
32          predecessors in title are attributed to the  
33          successors in title. Any other interpretation  
34          would render this variance standard a nullity.

1           That is, any violation of the zoning code could be  
2           cured by the mere passing of title to another  
3           person. At that point, the new owner would have a  
4           parcel not in compliance with a substantive  
5           provision of the code, but would have a right to a  
6           variance to legitimize the code violation. This  
7           would not leave any teeth in the code. It would  
8           encourage code violations and reconveyance to  
9           bless the violations." Petition for Review 11-12.

10           We find petitioner's observations regarding the "self-  
11           created hardship" standard to be reasonable. However, it is  
12           for the county, and not the petitioner or this Board, to  
13           interpret its own standards, and based upon its  
14           interpretations, to apply the criteria to the facts in the  
15           record in the form of findings. The county has not done so  
16           here.

17           The third assignment of error is sustained.

18           The county's decision is remanded.